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FEDERAL COMMUNICATIONS COMMISSION  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Implementation of Section 703(e) )  
of the Telecommunications Act )  
of 1996 ) CS Docket No. 97-151  
 )  
Amendment of Commission's Rules )  
and Policies Governing Pole )  
Attachments )

**BELLSOUTH REPLY COMMENTS**

BellSouth Corporation, on behalf of its affiliated companies, by counsel, files its reply to certain comments filed in response to the Commission's Notice of Proposed Rulemaking in the above referenced docket.<sup>1</sup>

**INTRODUCTION**

BellSouth is a member of the United States Telephone Association ("USTA") and participated in the formulation of USTA's comments in this proceeding. While BellSouth generally agrees with USTA's September 26, 1997, comments, BellSouth does not concur with Section VI of USTA's October 21, 1997 reply comments pertaining to the regulatory classification of access to Internet services, enhanced services, and information services provided by cable operators, and therefore files this separate reply.

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<sup>1</sup> Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Notice of Proposed Rulemaking* (August 12, 1997) ("NPRM"). Comments were filed on September 26, 1997. By Order dated October 10, 1997, the time to file reply comments was extended until October 21, 1997.

## **BACKGROUND**

In its NPRM, the Commission sought comment on whether its holding in *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.* should be extended to other circumstances.<sup>2</sup> In *Heritage*, the Commission held that Section 224 protected a cable operator's pole attachments employed within its franchise service area to provide nonvideo services. The Commission further held that the imposition of a separate pole attachment charge for nontraditional services within a cable operator's franchise service area violated Section 224's prohibition against unjust and unreasonable pole attachment rates.<sup>3</sup>

Because *Heritage* was decided prior to enactment of the Telecommunications Act of 1996,<sup>4</sup> all commenters addressing the issue noted that the 1996 Act extended the Commission's jurisdiction under Section 224 to attachments by both a "provider of telecommunication service" as well as by a "cable television system."<sup>5</sup> All commenters recognized that the amendments to Section 224 contained in the 1996 Act result in two separate pole attachment rate formulae: one that applies to any pole attachment used by a cable television system solely to provide cable service (the Section 224(d) rate); and another that applies (after parties fail to resolve a dispute over such charges) to pole attachments used by telecommunications carriers to provide telecommunications services (the Section 224(e) rate).

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<sup>2</sup> NPRM at ¶ 11.

<sup>3</sup> 6 FCC Rcd. 7099 (1991), *recon. dismissed*, 7 FCC Rcd. 4192, *aff'd sub nom. Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

<sup>4</sup> Pub. L. No. 104-104, 110 Stat. 61, 149-151, signed February 8, 1996 (the "1996 Act").

<sup>5</sup> 47 U.S.C. § 224(b). Section 224(b) formerly applied only to "any attachment by a cable television system."

Two commenters, Comcast Corporation, *et al.* and US West, filed comments stating that pole attachments used by cable operators to provide subscribers access to the Internet are subject to the Section 224(d) rate. US West states that these services are not “telecommunications services” and are not subject to regulation under Title II of the [Communications] Act.<sup>6</sup> Comcast, *et al.*, states that Internet and Internet-related services provided over the capacity of a cable system are “cable services” within the meaning of the Act and are therefore subject to the Section 224(d) rate.<sup>7</sup> In its Reply Comments, USTA argues that Comcast’s analysis fails to make a distinction between the provision and the transport of enhanced services and information services, that a cable operator that provides access to a third party ISP to its subscribers does so via telecommunications, and that the provisions of Section 224(e) apply to the cable operator’s pole attachments.<sup>8</sup>

As an initial matter, BellSouth disagrees with USTA’s analysis that whenever a service is not provided directly by the cable operator, it cannot qualify as a cable service.<sup>9</sup> BellSouth is not convinced that the Conference Report language quoted by USTA (“ . . . game channels and information services made available *by the cable operator*, as well as enhanced services . . .”) could not be interpreted to refer to such services made available through transport. As Comcast notes, the term “cable service” includes subscriber interaction, if any, which is required for the use

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<sup>6</sup> US West Comments at 4. AEP states that the FCC has determined in its *Universal Service Order* that information services are not telecommunications services. However, AEP argues that information services are neither telecommunications services nor cable services, and therefore pole attachments that carry information services over wires are not subject to either of the rate formulae under Section 224. AEP Comments at 10-11.

<sup>7</sup> Comcast, *et al.*, Comments at 18-20.

<sup>8</sup> USTA Reply Comments at Section 6 (pp. 14-20).

<sup>9</sup> *Id.*

of "other [than video] programming service."<sup>10</sup> "Other programming service" is broadly defined as "information that a cable operator *makes available* to all subscribers generally."<sup>11</sup> As Congress wrote in the original conference report:

By requiring that cable operators "make available" the information in a cable service to all subscribers generally, the Committee does not intend to restrict the manner in which cable operators may obtain the information provided as a cable service. In particular -- the provision of information over a cable system by a channel lessee or by the cable operator through a joint venture or other commercial arrangement would be a cable service if it met all other criteria for being a cable service.<sup>12</sup>

USTA's interpretation would lead to the conclusion that all video programming produced and provided by entities other than the cable television system distributor would not "qualify as a cable service." Commercial leased access channels, the example used by Congress in the 1984 House Report accompanying the Cable Act, are a concrete example of the overbreadth of USTA's distinction. Under USTA's analysis, a cable operator's provision of transport of commercial leased access video programming would not constitute a cable service.

The key, therefore, to determining whether or not "other programming services" are properly treated as "cable services" or "telecommunications services" depends upon whether, as Congress long ago observed, the provision of such services meets "all other criteria for being a cable service."<sup>13</sup> Where a cable operator offers other programming services, such as access to the Internet and Internet-related services over the capacity of a cable television system, to all of its subscribers as part of an elected Title VI cable offering, and where the cable operator consistently

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<sup>10</sup> Comcast, *et al.*, Comments at 18.

<sup>11</sup> *Id.* (emphasis added).

<sup>12</sup> Cable Communications Policy Act, P.L. 98-549, House Report No. 98-934 at 42 (1984).

<sup>13</sup> *Id.*

treats such services as being subject to Title VI cable regulation, such as paying fees on the revenues generated from such services pursuant to a cable franchise, such services are indeed "cable services" under the analysis set forth by Comcast. And where, as in the case of US West, a telecommunications carrier elects to provide multi-channel video programming through an affiliate or a subsidiary as a non-common carrier Title VI cable operator, that entity's provision of generally available cable modem service which permits its cable subscribers to access the Internet is also, under Comcast's analysis, properly categorized as "cable service."<sup>14</sup> In both cases, pole attachments used to provide such services are subject to the Section 224(d) rate.

### **CONCLUSION**

Where a cable operator offers access to the Internet with its other cable or information services as part of its franchised cable television offering, and where the cable operator consistently treats such service as being subject to Title VI cable regulation, such as paying fees on revenues generated by such offerings pursuant to a cable franchise, the appropriate regulatory

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<sup>14</sup> The 1996 Act expressly provides that telecommunications common carriers can operate as cable operators providing cable service under a local cable franchise and that the provision by a local exchange carrier of cable service over a cable system will not trigger an obligation pursuant to Title II to make transmission capacity available on a nondiscriminatory basis to any other person for the provision of cable service. 47 U.S.C. § 651, Conf. Rep. 172. Thus, telephone companies are treated for regulatory purposes just like any other cable operator for purposes of determining whether their service offerings are "telecommunications" or "telecommunications services" under the Act, or are "cable services" that are neither. Accordingly, Comcast's legal analysis applies with equal force to telephone companies offering "information access" and "internet access" service as part of a cable service.

classification of such services is "cable services." In such cases, the maximum rate for pole attachments is governed by Section 224(d).

Respectfully submitted,

BELLSOUTH CORPORATION

By:

A handwritten signature in dark ink, appearing to read "Theodore R. Kingsley", is written over a horizontal line.

M. Robert Sutherland  
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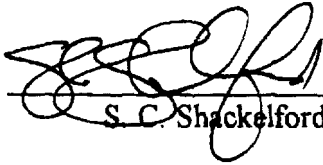
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DATE: October 21, 1997

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this 21st day of October, 1997, served the following parties to this action with a copy of the foregoing BELLSOUTH REPLY COMMENTS by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties on the attached service list.

  
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